

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FREDERICK WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 245176

Wayne Circuit Court

LC No. 01-003610

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), arson of a dwelling house, MCL 750.72, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the first-degree murder conviction, life in prison for the first-degree felony murder conviction, ten to twenty years in prison for the arson conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first claims that he was denied the effective assistance of counsel because his trial attorney failed to object and move to suppress the in-court identification of defendant by an eyewitness. We disagree.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Failure to move for a new trial or *Ginther* hearing usually forecloses appellate review unless the appellate record contains sufficient detail to support the defendant's claim. *Id.* Defendant did not move for a new trial or *Ginther* hearing before the trial court, and therefore, we must review this issue on the basis of the existing record. *Id.* "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's finding of fact are reviewed for clear error." *LeBlanc, supra*, 465 Mich at 579. "Questions of constitutional law are reviewed de novo." *LeBlanc, supra*, 465 Mich at 579.

To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456

Mich 543, 556; 581 NW2d 654 (1998), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). “The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy [and] must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), citing *Strickland*, *supra*, 466 US at 689-694.

Here, defendant alleges that the custodial lineup identification procedure was impermissibly suggestive and tainted the in-court identification. We disagree. First, “the fact that the witness was told that the perpetrator was in the lineup does not render the lineup unduly suggestive.” *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996). Second, there is conflicting testimony regarding what the officer conducting the lineup said. The jury chose to believe the officer and the witness. In any event, there is no evidence that the officer hinted to or suggested to the witness which person was the alleged perpetrator. The witness identified defendant on her own. Third, the lineup consisted of five participants, including defendant. At least two participants were similar in height to defendant. Generally, physical differences go to the weight of the identification, not the admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Physical differences are significant only if they are apparent to the witness and if they substantially distinguish defendant from the other participants. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993). Since physical differences generally go to the weight of the identification rather than the admissibility, and since there were two other participants similar in height to defendant, we find that the lineup was not impermissibly suggestive due to physical differences between defendant and the other participants.

Because the custodial lineup was not impermissibly suggestive, defendant has failed to establish any errors apparent on the record to warrant a conclusion that he was denied the effective assistance of counsel. Counsel is not required to make frivolous or meritless motions or objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Defendant next claims that his due process rights were violated when the trial court allowed evidence of his flight from the police to be introduced at trial. We disagree.

We note that defendant did not object to this evidence at trial. To preserve for appeal an issue regarding the admission of evidence, the party must have objected to the evidence at trial, MRE 103(a)(1); *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). Generally, a trial court’s determination of evidentiary issues is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Since defendant has failed to preserve this issue for appeal, we review this issue for a plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Evidence of flight is admissible as such evidence may be probative of a consciousness of guilt, although flight by itself is insufficient to sustain a conviction. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). “The term ‘flight’ has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The arresting officer testified that defendant fled when he jumped out of his car to arrest defendant. Thereafter, in the prosecution’s closing argument, it commented on defendant

fleeing from the police. We find that that evidence of defendant's flight is relevant, material and admissible because it was probative of defendant's consciousness of guilt. Since evidence of defendant's flight was admissible, defendant has failed to show that the trial court committed a plain error affecting his substantial rights by allowing the evidence to be admitted.

Defendant also asserts his right of due process was violated when the exercise of his right to remain silent was exposed to the jury. We disagree. We generally review de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because defendant did not raise this issue below, he has forfeited this issue unless he demonstrates a plain error that affected his substantial rights. *Carines, supra* at 763.

As our Supreme Court stated in *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), "a defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' cannot be used as evidence to cast doubt on the defendant's credibility." *Id.* at 573, citing *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Here, defendant was read his rights and verbally acknowledged that he understood each right. After being informed by the officer that there was an eyewitness to the crimes, defendant invoked his right to remain silent by stating that he was not going to talk until he got picked out of a lineup. At that point, the officer ended the interview. Defendant now argues that the prosecutor committed error requiring reversal when she solicited testimony implicating defendant's right to remain silent.

While we assume without deciding that the prosecutor's comment was improper, after reviewing the entire record and considering the statements in the context of the other evidence, we conclude that defendant has failed to show that the prosecutor's comment affected his substantial rights. The comment did not contribute to the verdict. There was substantial evidence to support defendant's conviction, including the fact that once he was advised the witness had identified him in the lineup, defendant voluntarily gave a statement implicating himself in the crimes. In addition, the fact that defendant had at one time invoked his right to remain silent was not raised or emphasized at any other time during trial.

Defendant last claims that he was denied his right to due process and a fair trial when he was refused counsel prior to making his statement. We disagree. A suspect in police custody must be informed specifically of the suspect's right to remain silent and have an attorney present before being questioned. *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). If the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. *Miranda, supra* at 474. In order to invoke the right to counsel, the suspect's request for counsel must be unambiguous. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). An ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Adams, supra* at 238.

Defendant was read his rights and verbalized that he understood each right. He was also asked to place his initials next to each right to verify that they were read to him and that he understood them. Defendant did not place his initials next to two rights, the right to remain silent and the right to an attorney. Defendant claims that since he did not initial the right to an attorney, he effectively invoked his right to an attorney and the interview should have immediately ceased. In order to invoke the right to an attorney, a suspect must do so unambiguously. *Adams, supra* at 237-238. Since defendant verbalized that he understood his rights and did not say that he wanted an attorney, the mere failure to initial the form to

acknowledge in writing that he was aware of his right to counsel was not an unambiguous invocation of his right to counsel. Since the alleged invocation of this right was ambiguous at best, the police officers did not have to cease the interrogation, *Adams*, *supra* at 238, and the confession was not obtained in violation of defendant's due process rights.

We note, although not raised at trial or on appeal that, “[d]ual convictions for premeditated murder and felony murder arising from [the] death of [a] single victim violate[s] double jeopardy.” *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Since defendant was convicted of both first-degree murder and felony murder, the appropriate remedy to protect his rights against double jeopardy is to modify the judgment of sentence to clarify that his conviction was for one count of first-degree murder supported by two theories – first-degree premeditated murder and first-degree felony- murder involving [arson].” *Id.*, citing *People v Zeitler*, 183 Mich App 68, 68; 454 NW2d 192 (1990).

Furthermore, defendant was charged with arson as the underlying felony for the felony-murder charge. He was convicted and sentenced on both charges. “Convictions of both felony murder and the underlying felony offend double jeopardy protections. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). “When a defendant is erroneously convicted of both felony-murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony.” *Id.* at 259-260.

Affirmed and remanded for the purpose of correcting the judgment of sentence to indicate defendant's conviction for one count of first-degree murder supported by two theories – first-degree premeditated murder and first-degree felony- murder involving arson, and to vacate defendant's arson conviction. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly